

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1692

Cir. Ct. No. 2011CV188

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BENJAMIN D. HARRIS,

PLAINTIFF-APPELLANT,

V.

LAKE OF THE TORCHES RESORT & CASINO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Vilas County:
NEAL A. NIELSEN, III, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Benjamin Harris appeals an order that vacated a circuit court judgment in his favor against Lake of the Torches Resort & Casino (Lake of the Torches). The circuit court determined Lake of the Torches, an arm of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Tribe),

never waived its sovereign immunity from suit, and, as a result, the circuit court lacked subject matter jurisdiction over Harris' claims. Accordingly, the court concluded its judgment in Harris' favor was void, and Lake of the Torches was entitled to relief from the judgment under WIS. STAT. § 806.07(1)(d).¹

¶2 We agree with the circuit court that Lake of the Torches did not waive its sovereign immunity from suit in state court. Consequently, the circuit court judgment awarding Harris damages was void for lack of subject matter jurisdiction. We therefore affirm the order vacating the judgment.

BACKGROUND

¶3 The Tribe is a “self-governing, federally recognized Indian nation that exercises sovereign authority over its members and its territory.” *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969, 971 (W.D. Wis. 2000). The Tribe owns Lake of the Torches Economic Development Corporation (the Corporation). See *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 685, 688 (7th Cir. 2011). The Corporation, in turn, owns and operates Lake of the Torches. *Id.* at 688.

¶4 Harris was hired as a back-up/prep cook at the Eagle's Nest Restaurant at Lake of the Torches in 2007. On October 13, 2008, Harris injured his right hand at work while operating an industrial mixer. He sought medical attention on October 20, 2008, and learned that three of his fingers were fractured.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 Lake of the Torches had a written policy governing worker's compensation. The policy provided, in relevant part, that Lake of the Torches employees were "covered under a Tribal Workers Compensation Insurance program and not subject to State Workers Compensation." Lake of the Torches was self-insured for worker's compensation purposes, but it utilized a third-party worker's compensation system administrator, Crawford & Company. Pursuant to its worker's compensation policy, Lake of the Torches paid Harris lost wages from the date of his injury until December 5, 2008. It also paid his medical expenses during that time.

¶6 On about December 4, 2008, Lake of the Torches' safety manager, Mark Wilke, received a Return-to-Work form from Harris' doctor stating that Harris could return to light duty work. On December 5, 2008, Wilke contacted Harris to offer him a temporary light duty position as a host in the Eagle's Nest Restaurant. For reasons the parties dispute, Harris did not return to work. Consequently, Lake of the Torches terminated Harris' employment and ceased paying him lost wage benefits and medical benefits.

¶7 Harris subsequently obtained additional medical treatment and physical therapy for his hand injury. He underwent seven surgeries, and one physician ultimately diagnosed him with a 100% permanent disability to his right hand.

¶8 On June 13, 2011, Harris sued Lake of the Torches and Crawford in Vilas County Circuit Court.² On July 8, 2011, Lake of the Torches, by special

² Crawford was later dismissed from the case.

appearance, filed a motion for a temporary stay of the circuit court proceedings pending an allocation of jurisdiction between the circuit court and the Lac du Flambeau Tribal Court. The motion asserted the tribal court was the appropriate forum for Harris' claims because they involved a dispute between a tribal employer and tribal employee related to activities that occurred on tribal land. The motion further asserted that Lake of the Torches "reserve[d] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity." (Capitalization omitted.)

¶9 On July 19, 2011, Lake of the Torches moved to transfer jurisdiction to the tribal court, pursuant to WIS. STAT. § 801.54. In its motion to transfer, Lake of the Torches again asserted it "reserve[d] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity." (Capitalization omitted.) Shortly thereafter, Lake of the Torches answered Harris' complaint, expressly asserting as an affirmative defense that the circuit court lacked jurisdiction because Lake of the Torches "enjoy[ed] the sovereign immunity of the Tribe."

¶10 The circuit court held a hearing on Lake of the Torches' motion to transfer on September 27, 2011. During the hearing, Lake of the Torches' attorney again asserted that he was making a "special appearance[,] and he "reserve[d] all jurisdictional objections, including ... the invocation of sovereign immunity." Counsel also repeatedly stated he did not have authority to waive Lake of the Torches' sovereign immunity. The circuit court acknowledged that Lake of the Torches had not waived its sovereign immunity. It subsequently granted Lake of the Torches' motion to transfer the case to tribal court.

¶11 The tribal court held a trial on Harris’ claims on August 9, 2012. However, eleven months later, the tribal court had not yet issued a decision. Consequently, on July 17, 2013, Harris filed a motion in the circuit court requesting that the case be transferred back to the circuit court. On August 7, 2013, the tribal court issued a decision denying Harris relief.

¶12 The circuit court subsequently granted Harris’ motion to transfer the case back to the circuit court. The circuit court reasoned the tribal court’s decision was invalid because it was not “procured in compliance with procedures required by the rendering court[.]” In addition, while the circuit court recognized that Lake of the Torches had asserted sovereign immunity as a defense in the initial circuit court proceedings, it concluded Lake of the Torches later waived that defense by failing to assert it in the tribal court. Accordingly, the court concluded sovereign immunity did not bar it from exercising subject matter jurisdiction over Harris’ claims.

¶13 Harris then submitted a trial brief to the circuit court, and the court undertook an independent review of the tribal court record. Lake of the Torches did not participate in these proceedings. The court ultimately entered a judgment awarding Harris \$197,152.98 in damages.

¶14 About two weeks later, Lake of the Torches moved to vacate the circuit court’s judgment, pursuant to WIS. STAT. § 806.07. The circuit court granted Lake of the Torches’ motion. Contrary to its previous decision, the court concluded Lake of the Torches had not waived its sovereign immunity in either the circuit court or the tribal court. As a result, the court reasoned the judgment against Lake of the Torches was void because the court “lacked subject matter

jurisdiction over [Lake of the Torches] due to its sovereign immunity from suit.” Harris now appeals.

DISCUSSION

¶15 A circuit court has discretion to grant or deny a motion for relief from judgment under WIS. STAT. § 806.07. See *Harbor Credit Union v. Samp*, 2011 WI App 40, ¶¶37-38, 332 Wis. 2d 214, 796 N.W.2d 813. We will affirm the court’s decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Id.*, ¶38.

¶16 However, where a circuit court’s exercise of discretion turns on a question of law, we review the legal question independently. See *Olson v. Farrar*, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809 N.W.2d 1. Here, the circuit court vacated its prior judgment because it determined Lake of the Torches had not waived its sovereign immunity from suit, and, as a result, the circuit court lacked subject matter jurisdiction. See *E.F.W. v. St. Stephen’s Indian High Sch.*, 264 F.3d 1297, 1302 (10th Cir. 2001) (“Tribal sovereign immunity is a matter of subject matter jurisdiction.”). Whether Lake of the Torches waived its sovereign immunity is a question of law subject to independent review. See *C & B Invs. v. Wisconsin Winnebago Health Dept.*, 198 Wis. 2d 105, 108, 542 N.W.2d 168 (Ct. App. 1995).

¶17 “It is well settled that Native American tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Id.* A tribe’s sovereign immunity also extends to its business arms. *Id.* “Like foreign sovereign immunity, ‘tribal [sovereign] immunity is a matter of federal law and is not subject to diminution by the States.’” *Koscielak v. Stockbridge-Munsee Cmty.*, 2012 WI

App 30, ¶7, 340 Wis. 2d 409, 811 N.W.2d 451 (quoting *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998)).

¶18 Consequently, in a state court lawsuit against a tribal entity, sovereign immunity applies “unless ‘Congress has authorized the suit or the tribe has waived its immunity.’” *Koscielak*, 340 Wis. 2d 409, ¶8 (quoting *Kiowa*, 523 U.S. at 754). A waiver of a tribe’s sovereign immunity cannot be implied; it must be unequivocally expressed. *C & B Invs.*, 198 Wis. 2d at 108. It cannot be inadvertent. *See id.* at 112. Waivers of sovereign immunity are strictly construed in favor of the sovereign. *Orff v. United States*, 545 U.S. 596, 601-02 (2005).

¶19 On appeal, Harris argues Lake of the Torches waived its sovereign immunity in three ways.

I. 1992 gaming compact

¶20 First, Harris contends the Tribe waived Lake of the Torches’ sovereign immunity from suit when it entered into a gaming compact with the State of Wisconsin in 1992. As Harris observes, Section XIX of the 1992 compact, entitled “Liability for Damage to Persons or Property,” states, in relevant part:

- A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage.
- B. The Tribe’s insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

Gaming Compact of 1992, Lac Du Flambeau Band of Lake Superior Chippewa Indians-State of Wis., Section XIX, March 23, 1992, *available at* http://www.doa.state.wi.us/Documents/DOG/Indian%20Gaming/Compacts/LDF_Compact.pdf. Harris argues Section XIX of the 1992 compact waived Lake of the Torches' sovereign immunity from all personal injury claims. Because tribal employees are not subject to Wisconsin's worker's compensation statutes, *see Aasen-Robles v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 2003 WI App 224, ¶22 n.7, 267 Wis. 2d 333, 671 N.W.2d 709, Harris asserts his claims against Lake of the Torches amount to common law personal injury claims. He therefore argues the waiver of sovereign immunity contained in the 1992 compact applies to his claims.

¶21 Harris' argument regarding the 1992 compact fails for two reasons. First, Section XIX of the 1992 compact merely requires the Tribe's *insurance policy* to include a promise by the *insurer* that the *insurer* will not attempt to escape liability under the terms of the policy by invoking sovereign immunity. Section XIX does not address the *Tribe's* sovereign immunity from personal injury claims. Moreover, because the Tribe is self-insured for worker's compensation purposes, any provision in the compact requiring the inclusion of a particular term in the Tribe's insurance policy is inapplicable. As such, Section XIX is not a clear and unequivocal waiver of Lake of the Torches' sovereign immunity.³

³ In support of its argument that the 1992 compact did not waive its sovereign immunity, Lake of the Torches cites additional language, which it implies is taken from the 1992 compact. However, upon our review of the record, we discovered that the cited language is actually from a 2009 amendment to the 1992 compact. Because Harris' injury occurred in 2008, the 2009 amendment is inapplicable.

¶22 Second, we agree with Lake of the Torches that any waiver of sovereign immunity contained in Section XIX of the 1992 compact applies only to claims related to Class III gaming activities. In *Taylor v. St. Croix Chippewa Indians*, 229 Wis.2d 688, 692, 599 N.W.2d 924 (Ct. App. 1999), a tribal employee was injured during construction of a tribal youth center. The tribe had a comprehensive business insurance policy, but the policy excluded coverage for the injured employee's claim. *Id.* The injured employee argued the tribe was required to carry liability insurance covering his claim, pursuant to the tribe's gaming compact with the state, which included a liability insurance requirement identical to the one in the 1992 compact. *Id.* at 692-94.

¶23 On appeal, we rejected the employee's argument that the tribe's compact required it to carry liability insurance for his claim, noting that the compact governed "the conduct of Class III gaming under the terms and conditions set forth below[.]" *Id.* at 694. Pursuant to this language, we reasoned:

Clearly, the intent of the parties in entering into the gaming compact was to regulate St. Croix's class III gaming activities. Pursuant to the compact, St. Croix was required to "maintain public liability insurance with limits of not less than \$250,000 for any one person." Further, under the gaming compact, St. Croix's policy was mandated to "include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under [the compact]." It follows logically that the gaming compact required St. Croix to maintain liability insurance only with respect to its gaming activities. To require St. Croix to maintain liability insurance with respect to other non-gaming activities would obviously reach beyond the purpose and intent of the gaming compact. Wisconsin has no reason or authority to impose an obligation on the tribe to maintain liability insurance for anything beyond its gaming activities.

Id. In other words, we concluded the liability insurance requirement in the tribe's compact "applie[d] only to gaming activities[.]" *Id.* at 695. We rejected the

injured employee’s argument that construction of the tribal youth center qualified as a gaming activity because it was funded with gaming revenue. *Id.*

¶24 Like the compact in *Taylor*, the 1992 compact purports to regulate the Tribe’s class III gaming activities. See Gaming Compact of 1992, Lac Du Flambeau Band of Lake Superior Chippewa Indians-State of Wis., Preface. The United States Supreme Court recently clarified that the term “class III gaming activity” “means just what it sounds like—the stuff involved in playing class III games ... each roll of the dice and spin of the wheel.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014). “The ‘gaming activit[y]’ is ... the gambling.” *Id.* at 2033. Applying this definition, Harris—who was injured while working as a cook at a restaurant located in a casino—was not injured in connection with a class III gaming activity. Consequently, even if we agreed with Harris that Section XIX of the 1992 compact waived Lake of the Torches’ sovereign immunity from personal injury claims, we would nevertheless conclude that waiver was inapplicable to Harris’ claims.

II. Failure to timely raise sovereign immunity as a defense

¶25 Harris next argues Lake of the Torches waived its sovereign immunity from suit by failing to timely raise sovereign immunity as a defense. Citing WIS. STAT. § 802.06(2), Harris argues the defense of lack of subject matter jurisdiction must be asserted “in the early stages of the proceedings.”⁴ Harris then

⁴ WISCONSIN STAT. § 802.06(2) provides, in relevant part:

(continued)

asserts that Lake of the Torches “knowingly declined the opportunity to raise [a sovereign immunity] defense at any time before judgment[.]”

¶26 Harris is mistaken. As discussed above, in its first two circuit court filings, Lake of the Torches specifically “reserve[d] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity.” (Capitalization omitted.) In its answer, Lake of the Torches then asserted as an affirmative defense that the circuit court lacked subject matter jurisdiction because Lake of the Torches “enjoy[ed] the sovereign immunity of the Tribe.” Finally, at the hearing on its motion to transfer, Lake of the Torches “reserve[d] all jurisdictional objections, including ... the invocation of sovereign immunity[,]” and its attorney repeatedly stated he did not have authority to waive Lake of the Torches’ sovereign immunity. On these facts, Harris’ claim that Lake

(a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

....

2. Lack of jurisdiction over the subject matter.

....

(b) A motion making any of the defenses in par. (a) 1. to 10. shall be made before pleading if a further pleading is permitted

of the Torches failed to raise sovereign immunity as a defense at the early stages of the circuit court proceedings is demonstrably false.⁵

III. Specific acts by Lake of the Torches or its representatives

¶27 Harris also argues three specific acts by Lake of the Torches or its representatives were sufficient to waive its sovereign immunity. First, Harris asserts that Crawford waived Lake of the Torches' sovereign immunity by writing Harris a letter on December 9, 2008, that stated, "We will continue paying your medical bills as they relate to this work injury." However, a waiver of sovereign immunity must be approved by a tribe's governing body—here, the Tribal Council. *See Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 112 (S.D. 1998). Harris cites no evidence that the Tribal Council granted Crawford authority to waive Lake of the Torches' sovereign immunity.

¶28 Moreover, even if Crawford had authority to waive Lake of the Torches' sovereign immunity, Harris does not explain why Crawford's mere promise to pay benefits constituted a waiver of immunity from suit in state court. A pre-suit promise to pay medical bills is not the sort of clear and unequivocal waiver of sovereign immunity required by law. *C.f. Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1289 (11th Cir. 2001) (A tribe's contractual promise to comply with the Rehabilitation Act merely amounted to a promise to not discriminate and

⁵ In his reply brief, Harris suggests that reserving the right to invoke sovereign immunity was insufficient, and Lake of the Torches was instead required to file a motion to dismiss under WIS. STAT. § 802.06(2)(b). However, § 802.06(2)(a) specifically states that a defense of lack of subject matter jurisdiction may be raised in a responsive pleading. Lake of the Torches raised sovereign immunity as an affirmative defense in its answer to Harris' complaint.

“in no way constitute[d] an express and unequivocal waiver of sovereign immunity[.]”).

¶29 Second, Harris argues Lake of the Torches’ attorney expressly waived Lake of the Torches’ sovereign immunity during the tribal court proceedings. According to Harris, during a June 12, 2012 hearing before the tribal court, counsel stated Lake of the Torches was not asserting sovereign immunity as a defense because it wanted Harris to have his day in court. Harris contends Lake of the Torches’ attorney made similar comments during his closing argument at trial.⁶

¶30 Assuming Lake of the Torches’ attorney actually made these statements, there is no evidence he was authorized to do so by the Tribal Council. *See Calvello*, 584 N.W.2d at 112. In addition, Harris cites no authority for the proposition that a waiver of sovereign immunity from suit in tribal court also waives a tribe’s sovereign immunity from suit in state court. To the contrary, the Supreme Court has repeatedly stated that the scope of a waiver of sovereign immunity must be strictly construed in favor of the sovereign. *See, e.g., Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011). Accordingly, in the context of state sovereign immunity, “a State’s consent to suit in its own courts is not a waiver of its immunity from suit in federal court.” *Id.* Harris has not convinced us the result should be different in a case involving tribal sovereign immunity.

⁶ On appeal, Lake of the Torches characterizes these statements by its trial attorney as “off-the-record” comments. However, according to Harris, the only reason the record does not contain a transcript of the June 12, 2012 hearing is that the hearing was not properly recorded. Similarly, the transcript of the August 9, 2012 trial states that the attorneys’ closing arguments were not transcribed because they were “[missing] from the disc[.]” which “pick[ed] up during rebuttal.” Under these circumstances, Lake of the Torches’ attorney’s comments cannot reasonably be characterized as off-the-record.

¶31 Finally, Harris argues Lake of the Torches waived its sovereign immunity by failing to participate in the circuit court proceedings after Harris moved to transfer the case back to the circuit court. In response, Lake of the Torches argues its failure to participate was not deliberate because its attorney's license was suspended at the time. Harris, however, asserts that notice of the circuit court proceedings was sent directly to Lake of the Torches, and Lake of the Torches could have hired a different attorney to represent it.

¶32 Regardless of the reason for Lake of the Torches' failure to participate in the circuit court proceedings, we conclude its failure did not constitute a clear, unequivocal, and advertent waiver of sovereign immunity. Shortly after Harris filed his motion to transfer the case back to the circuit court, Lake of the Torches obtained a binding judgment in its favor in tribal court. At that point, there was no need for Lake of the Torches to return to the circuit court to defend the action. Under these circumstances, Lake of the Torches' failure to participate in the circuit court proceedings did not clearly waive its sovereign immunity from suit.

¶33 Because Lake of the Torches did not waive its sovereign immunity, the circuit court correctly concluded the judgment in Harris' favor was void for lack of subject matter jurisdiction. Consequently, the court properly exercised its discretion by granting Lake of the Torches' motion to vacate the judgment.⁷

⁷ Lake of the Torches raises alternative grounds to affirm the circuit court's order. Because we resolve the appeal on sovereign immunity grounds, we need not address these alternative arguments. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one is dispositive).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

